

*Counsel listed on signature pages*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

CASCADES COMPUTER INNOVATION  
LLC,

Plaintiff,

v.

RPX CORPORATION; HTC  
CORPORATION; and SAMSUNG  
ELECTRONICS, CO., LTD.

Defendants.

Case No. 4:12-cv-01143 YGR

**JOINT STATUS STATEMENT**

Date: June 20, 2014  
Time: 9:01 a.m.  
Judge: Hon. Yvonne Gonzalez Rogers  
Location: Courtroom 5

Pursuant to the Court's March 4, 2014 Order Staying Case (Docket No. 133) (the "Stay Order"), the parties respectfully submit this joint statement to update the Court on the status of related patent litigation pending in the Northern District of Illinois, and state the parties' respective positions on whether the stay of proceedings in this action through July 2, 2014 should be extended or lifted.

**Joint Summary of Progress in the N.D. Illinois Patent Actions**

Cascades' patent cases against Samsung and HTC remain consolidated for pre-trial purposes and continue to proceed as described by the Court in its Stay Order. Fact discovery closed as scheduled on April 30, 2014, with the exception of depositions of two percipient witnesses, which were completed in May. (N.D. Ill. Case No. 1:11-cv-04574 ("N.D. Ill."), Dkt. No. 159). Initial expert reports were served on May 21, 2014. Rebuttal expert reports remain due on June 25, 2014, and expert depositions must be completed by July 30, 2014. (N.D. Ill., Dkt. Nos. 151, 152). All dispositive motions must be filed by August 27, 2014. (*Id.*)

One early summary judgment motion has been filed. On January 29, 2014, Cascades entered into a license agreement with Google Inc. and Motorola Mobility regarding the '750 patent. On March 26, 2014, the parties filed a Second Supplemental Joint Status Report (N.D. Ill., Dkt. No. 153), in which the defendants stated their intention to file a joint motion for summary judgment asserting that, as a result of Cascades' license agreement with Google and Motorola, Cascades has exhausted its rights to enforce the '750 patent against the defendants' use of the Google Android Operating System (the "Exhaustion Motion"). Cascades contends that the license agreement expressly excludes HTC and Samsung Android Products from the scope of the license and does not exhaust Cascades' rights of enforcement against Samsung and HTC. Following a status hearing on April 7, 2014, the Court ordered that the briefing of the exhaustion motion be conducted on an earlier schedule than other dispositive motions. (N.D. Ill., Dkt. No. 155). Accordingly, defendants' exhaustion motion was filed on April 29, 2014 (N.D. Ill., Dkt. Nos. 156 [sealed version] & 157 [public redacted version]), Cascades' opposition brief was filed on May 27, 2014 (N.D. Ill., Dkt. No. 169), and defendants' reply brief was filed on June 10, 2014

(N.D. Ill., Dkt. No. 176). The parties are currently scheduled to appear for a status hearing on July 16, 2014, at which time the exhaustion motion may be addressed. (N.D. Ill., Dkt. No. 166).

**Plaintiff's Statement Regarding Continued Stay of this Antitrust Case**

An extension of this Court's March 4, 2014 Order staying this case is not only prejudicial to the plaintiff, it is contrary to public policy. As an example of RPX's continued misconduct, after an infusion of \$500,000 in cash from Apple, RPX unsuccessfully attempted to use a Patent Office procedure known as an *Inter Partes* Review ("IPR") to circumvent a \$368 million judgment against another co-conspirator Apple (see attached article *Patent Troll on the Verge of Winning 1 Percent of iPhone Revenue*, June 6, 2014, Joseph Mullin) (Exhibit A). So, while this case remains stayed, RPX continues its illegal practices with other co-conspirators, to the detriment of the public.

The Supreme Court has long recognized that the public interest is an important component of the federal antitrust laws:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

*United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 652 (1985) ("The Sherman and Clayton Acts, reflect Congress' appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. Questions arising under these Acts are among the most important in public law.").

This public interest is served by the *private* pursuit of antitrust claims like this one because private suits vindicate the public interest in competition and thereby further public policy. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 147 (1968) (antitrust law "encourages [plaintiff's] suit to further the overriding public policy in favor of competition"). Indeed, the Clayton Act provides private treble damage and private injunctive

1 relief remedies precisely for the purpose of encouraging injured firms to act as “private attorneys  
 2 general” so as to protect the public’s interest in competition. *See, e.g., Zenith Radio Corp. v.*  
 3 *Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (“the purpose of giving private parties  
 4 treble and injunctive relief remedies was not merely to provide private relief, but was to serve well  
 5 the high purpose of enforcing the antitrust laws” and to protect “the public interest”); *Hawaii v.*  
 6 *Standard Oil Co.*, 405 U.S. 251, 262 (1972) (“By offering potential litigants the prospect of a  
 7 recovery in three times the amount of their damages, Congress encouraged these persons to serve  
 8 as ‘private attorneys general’”); *Reiter v. Sonatone Corp.*, 442 U.S. 330, 344 (1979) (“Congress  
 9 created the treble damages remedy ... precisely for the purpose of encouraging *private* challenges  
 10 to antitrust violations. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977), the Supreme  
 11 Court reiterated its “longstanding policy of encouraging vigorous private enforcement of the  
 12 antitrust laws” and concluded that giving antitrust standing to directly injured private parties  
 13 would further “the legislative purpose in creating a group of ‘private attorney generals’ to enforce  
 14 the antitrust laws.” An indefinite stay of this case undermines the public’s interest in competition  
 15 policy and allows RPX’s anticompetitive conduct to continue unabated.

16 Further, final resolution of the pending Chicago patent cases (whenever that happens) will  
 17 not moot this case because RPX is not a party to those cases and its participation in the conspiracy  
 18 is not rendered immune from liability because one or more of its co-conspirators settles or is found  
 19 not to infringe. *Summit Health, Ltd. v. Pinhaus*, 500 U.S. 322, 330 (1991) (“[T]he essence of any  
 20 violation of § 1 is the illegal agreement itself...”). Thus, even if the Illinois court were to grant  
 21 summary judgment of patent exhaustion, the decision would have no bearing on the defendants’  
 22 liability in this action or on the resultant antitrust injury suffered by Cascades. The Motorola  
 23 agreement was executed in January of this year, more than two years after the conspiracy forming  
 24 the basis for this case began; it cannot retroactively eliminate the defendants’ liability for their  
 25 actions leading up to the Motorola agreement. Nor does the agreement somehow eliminate the  
 26 injury to Cascades caused by the defendants’ prior conduct, as defendants contend. In fact, the  
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1 Motorola agreement only constitutes additional evidence of the defendants' continued conspiracy  
2 to drive down the price of the '750 patent.

3 The boycott of the Elbrus patents is unlawful regardless of whether the patents are found to  
4 be invalid or not infringed. An individual defendant could decide for itself that the patents are  
5 invalid and/or not infringed and decline to license the patents. But, potential licensees, who  
6 compete against each other in a relevant product market, cannot lawfully decide to boycott the  
7 patents and jointly refuse to take licenses. If the patents turn out to be invalid or uninfringed in the  
8 Illinois case, that might impact damages from a boycott. But the boycott itself remains illegal. A  
9 contrary holding would authorize licensees to boycott any patent issued by the PTO prior to it  
10 being held invalid and not infringed. In addition, and most importantly, not all of the 28 boycotted  
11 patents are at issue in the Chicago lawsuit (including U.S. Patent No. 6,366,130, which is  
12 infringed by Samsung). So, no matter what happens in that case, the illegal impact of the boycott  
13 exists.

14 In addition, there is substantial prejudice to Cascades from a continued stay. Cascades  
15 brought this suit more than two years ago, on March 7, 2012; it has twice amended its complaint,  
16 finally defeated RPX's motion to dismiss and, on the eve of important discovery, faces an  
17 indefinite delay. That delay causes memories to fade, third-party documents to be lost, and allows  
18 RPX to continue its illegal acts, in violation of the antitrust laws. In light of these concerns, the  
19 Ninth Circuit disfavors stays, especially those that are lengthy or indefinite. *Dependable Highway*  
20 *Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th Cir. 2007) (explaining that  
21 lengthy or indefinite stays are disfavored); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112-13 (9th  
22 Cir. 2005) (finding that neither the balance of hardships between the parties nor the prospect of  
23 narrowing the factual and legal issues in the other proceeding justifies a stay); *see also Otey v.*  
24 *Crowdflower, Inc.*, 2013 U.S. Dist. LEXIS 65813, at \*4 (N.D. Cal. May 8, 2013) (requiring  
25 moving party to make a **strong showing** as to why discovery should be denied by establishing a  
26 specific need for a stay). No further stay should be permitted.

1 Finally, in the event the Court decides to grant another stay (which we oppose), Cascades  
 2 requests leave to at least permit limited discovery in the form of narrowly tailored document  
 3 requests. Such requests would not unduly burden defendants. Specifically, Cascades would  
 4 request that the Court direct the defendants to produce the following categories of documents  
 5 under Fed. R. Civ. P. 34:

- 6 1. All communications between RPX and any current or previous defendant in the  
 7 '750 patent cases (including Samsung and HTC) relating to Cascades, Anthony  
 8 Brown, the '750 patent, the Elbrus patent portfolio, the '750 patent cases currently  
 9 or previously pending in the Northern District of Illinois, or the present litigation.
- 10 2. All communications between Samsung and any other current or prior defendant in  
 11 the current or prior Northern District of Illinois patent cases relating to Cascades,  
 12 Anthony Brown, the '750 patent, the Elbrus patent portfolio, the '750 patent cases  
 13 currently or previously pending in the Northern District of Illinois, or the present  
 14 litigation.
- 15 3. All communications between HTC and any other current or previous defendant in  
 16 the current or prior Northern District of Illinois patent cases relating to Cascades,  
 17 Anthony Brown, the '750 patent, the Elbrus patent portfolio, the '750 patent cases  
 18 currently or previously pending in the Northern District of Illinois, or the present  
 19 litigation.
- 20 4. All agreements and contracts between RPX and any current or previous defendant  
 21 in the '750 patent cases, including HTC and Samsung.

22 **Defendants' Statement Regarding A Further Stay of the Antitrust Proceedings**

23 For all of the same reasons identified by the Court in its original Stay Order, the defendants  
 24 respectfully submit that the stay of proceedings in this action should be extended by at least 120  
 25 days, at which time the propriety of maintaining the stay may be reevaluated.

26 First, the Court has already ruled that, because the patent defendants' non-infringement and  
 27 invalidity defenses have "the potential to narrow substantially, or moot entirely, the antitrust issues  
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1 now before this Court,” (Stay Order at 2:23-24), “[t]he most efficient course in this matter is to  
2 resolve validity and infringement issues before pivoting to Plaintiff’s antitrust case.” (Stay Order  
3 at 5:16-17). The Court has further observed that dispositive motions in patent cases frequently  
4 resolve such issues. (Stay Order at 4:4-8). As noted, all dispositive motions remain due to be  
5 filed in the patent cases by August 27, 2014. (*See* N.D. Ill., Dkt. No. 151). A 120-day extension  
6 of the existing stay of this case, until early November, would thus allow a reasonable amount of  
7 time—slightly more than two months—for those motions to be fully briefed, heard, and decided.  
8 Without such an extension, the efficiencies identified by the Court in allowing the invalidity and  
9 non-infringement issues to be decided first, “before pivoting to Plaintiff’s antitrust case,” would be  
10 lost.

11 Second, Cascades’ recent license agreement with Google and Motorola, and the patent  
12 court’s decision to fast-track the defendants’ resulting Exhaustion Motion, provide yet another  
13 basis on which the resolution of the patent cases may moot or streamline this antitrust action. If  
14 the patent court grants the Exhaustion Motion by ruling that Cascades’ license agreement with  
15 Google precludes Cascades from enforcing the ‘750 patent against downstream Android users  
16 such as Samsung and HTC, then Cascades could have suffered no injury or damages from  
17 defendants’ supposed conspiracy to refuse to license an unenforceable patent, and its antitrust  
18 claims based on the ‘750 patent will be rendered moot. *See Jones Knitting Corp. v. Morgan*, 244  
19 F. Supp. 235, 239 (E.D. Pa. 1965) (*overruled on other grounds by* 361 F.2d 451 (3d Cir. 1966)) (no  
20 injury from alleged antitrust conspiracy where underlying patent found invalid); *Sony Elecs., Inc.*  
21 *v. Soundview Techs., Inc.*, 281 F. Supp. 2d 399, 402-03 (D. Conn. 2003) (no injury from alleged  
22 antitrust conspiracy where patent was not infringed). Thus, the probability that the resolution of  
23 the patent cases will affect the scope of this case has already materially increased during just the  
24 short time the stay has been in effect.

25 Cascades is simply incorrect that its antitrust case could proceed based on an invalid or  
26 non-infringed patent, on the theory that the alleged boycott would “remain illegal.” In addition to  
27 proof of an antitrust violation, Cascades cannot prevail unless it establishes the essential elements  
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1 of injury and damages—something it cannot do if the underlying patent is valueless. *See, e.g., J.*  
 2 *Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Brunswick Corp. v. Pueblo*  
 3 *Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977) (to recover on a private antitrust claim a plaintiff  
 4 must prove more than an antitrust violation, “since such proof establishes only that injury may  
 5 result”).

6 Moreover, while this case nominally involves Elbrus patents other than the ‘750 patent,  
 7 Cascades alleges in its Complaint that the only patent “the manufacturer defendants specifically  
 8 needed access to and were using was the ‘750 patent,” and Cascades has only pleaded injury from  
 9 its alleged inability to license the ‘750 patent as to devices using Google’s Android operating  
 10 system. *See* Amended Complaint, ¶¶ 19, 92-100. Cascades makes no relevant allegations with  
 11 respect to other patents other than alleging that Defendants wanted any license to cover all of  
 12 Cascades’ patents. Thus, as this Court has already observed, the ‘750 patent is at a minimum the  
 13 “primary patent at issue” in this case. *See, e.g.,* Dkt. No. 93 at 21:18-21; Stay Order at 3:20-22  
 14 (“In this case, as Defendants aptly remark, if the Illinois litigation determines that Plaintiff’s ‘750  
 15 Patent is invalid, any damage stemming from a refusal to negotiate a license under that patent may  
 16 well prove to be illusory.”).

17 Third, Cascades makes allegations above concerning an *inter partes* review (“IPR”) action  
 18 that RPX initiated as to patents that are not at issue in this case. Cascades’ aspersions are  
 19 unfounded, and in any event irrelevant: the law limits any relief that Cascades could obtain in this  
 20 case to its own supposed injuries in the alleged relevant market (namely, licenses for the ‘750  
 21 patent). *See Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (private plaintiff may only  
 22 seek redress of injuries to markets in which it participates); *Or. Laborers-Emp’rs Health &*  
 23 *Welfare Trust v. Philip Morris Inc.*, 185 F. 3d 957, 966-67 (9th Cir. 1999) (same). Furthermore,  
 24 Congress created the IPR procedure, pursuant to the America Invents Act, to subject asserted  
 25 patents to scrutiny. The Supreme Court holds that testing the validity of asserted patents, as RPX  
 26 has done, serves the public interest. *See Fed. Trade Comm’n v. Actavis, Inc.*, 133 S. Ct. 2223,  
 27 2233 (2013) (emphasizing “the patent-related policy of eliminating unwarranted patent grants so  
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1 the public will not ‘continually be required to pay tribute to would-be monopolists without need or  
2 justification’”) (quoting *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969)).

3 Fourth, the existing stay has not unfairly prejudiced Cascades, and nor would the proposed  
4 extension. The patent cases are on the same aggressive schedule they have been on since  
5 February, and there is no reason to believe an extension of the stay would cause unreasonable  
6 delay. The Court has already rejected, and should reject again, Cascades’ recycled assertions that  
7 the proposed limited extension of the stay would be “indefinite,” or would cause evidence to be  
8 lost. (Stay Order at 4:11-12) (the Court notes that the stay entered here is not one of “indefinite”  
9 duration); (*id.* at 5:1-4) (“Plaintiff’s fourth and final prejudice argument is that the stay will result  
10 in lost evidence due to fading memories and witness unavailability. The Court disagrees. The stay  
11 contemplated here is brief. A concern for loss of evidence exists anytime a court issues a stay and  
12 does not supply sufficient grounds to refrain from issuing an otherwise appropriate stay.”)

13 Moreover, the fact that Cascades unsuccessfully moved the patent court to stay all other  
14 proceedings in the patent cases pending resolution of the defendants’ Exhaustion Motion belies  
15 any suggestion by Cascades that time is of the essence. (*See* N.D. Ill., Dkt. No. 155). Ostensibly,  
16 Cascades believes that at least one of the patent defendants’ dispositive motions could  
17 meaningfully impact the scope of further litigation between the parties. It should not be heard to  
18 argue otherwise here.

19 Finally, Cascades’ alternative requests for expansive document discovery should be  
20 rejected. Far from being “limited” and “narrowly tailored,” Cascades’ requests encompass  
21 virtually all of the discovery to which Cascades might arguably be entitled in this action (assuming  
22 such discovery ever becomes necessary) and would require defendants to undertake expensive  
23 searches for electronically stored information. *See In re Lithium Ion Batteries Antitrust Litig.*,  
24 2013 WL 2237887, at \*2 (N.D. Cal. May 21, 2013) (“antitrust discovery can be enormously  
25 expensive and burdensome.”) (J. Gonzalez Rogers); *see also Bell Atlantic Corp. v. Twombly*, 550  
26 U.S. 544, 558 (2007). Further, Cascades apparently intends to seek documents that are protected  
27 by the joint defense and common interest privileges, meaning discovery motion practice may be  
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1 necessary. In short, requiring the parties to undertake such an inherently complex and costly  
 2 discovery process—at a time when it is unclear whether Cascades’ antitrust suit has any merit—  
 3 would seriously undermine the efficiency of the stay. *See, e.g., Masimo Corp. v. Philips Elecs. N.*  
 4 *Am. Corp.*, 2010 WL 925864, at \*3 (D. Del. March 11, 2010) (staying antitrust action pending  
 5 result of patent litigation because “the court is cognizant of the need to prevent the parties from  
 6 conducting discovery that will ultimately prove unnecessary”); *accord Apotex v. Senju*  
 7 *Pharmaceutical Co., Ltd.*, 921 F. Supp. 2d 308, 315 (D. Del. 2013). Given that a finding of  
 8 invalidity, non-infringement, or unenforceability of the ‘750 patent could moot all of Cascades’  
 9 proposed discovery by depriving Cascades of standing to pursue its antitrust claims, the Court  
 10 should not allow Cascades to pursue its requests until the Illinois patent litigation is resolved.

11 Dated: June 13, 2014

Respectfully submitted,

12 /s/ Ashley E. LaValley

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**E-FILING ATTESTATION**

I, Michael W. Scarborough, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Michael W. Scarborough

Michael W. Scarborough